

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

HOLLY BRA OF CALIFORNIA, INC., Respondent

---

On Petition For Enforcement Of An Order Of  
The National Labor Relations Board

---

BRIEF FOR HOLLY BRA OF CALIFORNIA, INC.

---

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22	<u>Yip Mie Jork v. Dulles, 237 F. 2d 383 . . . . .</u>	45
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1 MISCELLANEOUS:  
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3 4 Davis; Administrative Law 145, §29.06 . . . . . 38  
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1 IN THE  
2 UNITED STATES COURT OF APPEALS  
3 FOR THE NINTH CIRCUIT

4  
5 No. 22,543

6 NATIONAL LABOR RELATIONS BOARD, Petitioner

7 v.

8 HOLLY BRA OF CALIFORNIA, INC., Respondent

9  
10 On Petition For Enforcement Of An Order Of  
11 The National Labor Relations Board

12  
13 BRIEF FOR HOLLY BRA OF CALIFORNIA, INC.  
14

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17 I

18 JURISDICTION

19 The Court has jurisdiction of the petition of the  
20 National Labor Relations Board herein pursuant to Section  
21 10(e) of the National Labor Relations Act, as amended, [61  
22 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, 160(e)].



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II

STATEMENT OF THE CASE

A. Preliminary Statement Concerning Scope Of Respondent's  
Objections To Enforcement Of Board's Order.

Respondent does not object to the enforcement by order of this Court of the Decision and Order of the Board, insofar as the Board has found Respondent in violation of Section 8(a)(1) of the Act by reason of its pre-election conduct. Thus, the Court need not concern itself with a review of the record upon those matters discussed under Point I-B of the Board's Statement of the Case nor in Point I of the Board's argument therein. Accordingly, sub-paragraphs (b) through (h) of the Board's recommended Order (R. 55-57) may be enforced without further consideration. Respondent does not agree that these findings are correct, but concedes that this portion of the Order should be affirmed by the Court upon normal application of the substantial evidence rule.

Respondent, on the other hand, will strenuously object to the enforcement by this Court of sub-paragraph (1)(a) and sub-paragraphs (2)(a) and (2)(b) of the Board's Order relating to its findings that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by discriminatorily causing the termination of employment of Dulce Fumero and by refusing to rehire her. (Board's Brief, Point I-C;



1 Argument, Point II).

2 The Board's Brief summarily dismisses Respondent's  
3 entire position herein in a footnote (fn 11, p. 8) to the  
4 effect that it is settled law that matters of credibility  
5 are not for the Court. Unfortunately, there do exist most  
6 substantial issues on this record which are quite properly  
7 before the Court, and the matter cannot be so easily  
8 disposed of by mere reference to broad rules of law.

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1 B. Statement Of Facts.

2 Holly Bra of California, Inc. is a California  
3 corporation whose primary business is the manufacture of  
4 brassieres, both under its own label and also under the  
5 label of various retail stores for whom Holly Bra of  
6 California, Inc. manufactures this product. Because the  
7 work is seasonal and is very slow during the months of  
8 December, January, February and March, Respondent, for  
9 two or three years prior to the Union election, had obtained  
10 other contract work for the manufacture of swim suits and  
11 girdles (Tr. 192-194). At the time of the N.L.R.B. election  
12 in 1966, Holly Bra employed approximately ninety-eight  
13 employees in all phases of its business (Tr. 301).

14 Mr. Efram Young is the President of Holly Bra of Cali-  
15 fornia, Inc., and his brother, David Young, is its Secretary-  
16 Treasurer (Tr. 191). David Young was a witness for Respondent  
17 and is variously identified in the Transcript as "David"  
18 or "Young". (He will be referred to hereafter in this  
19 brief as "Young", and all other witnesses will be identified  
20 by their last names.)

21 Respondent's plant manager is Mr. Mitsuo Yoshida. He  
22 also testified on behalf of Respondent and was variously  
23 referred to by all of the witnesses as "Mitch" or "Yoshida".  
24 Hazel Smith was the direct supervisor over the alleged dis-  
25 criminatee, Dulce Fumero, in the swim suit or swim wear depart-  
26 ment (Tr. 345). Genoveva Sanchez supervised the brassiere



1 department but became involved with the alleged dis-  
2 criminatee, Dulce Fumero, during the sequence of events  
3 which are in dispute in this proceeding. (Sanchez  
4 appears in the Transcript as "Genovena", but her name  
5 was corrected by motion of General Counsel. (See, R.  
6 22-23, fn. 5). Dulce Fumero had been in the employ of  
7 Respondent since 1963, and it is conceded that until some  
8 three or four days after the Union was defeated in the  
9 election, Fumero had performed her work satisfactorily.  
10 Commencing in approximately September, 1965, Fumero had  
11 been employed, as she was at the time of the election,  
12 to sew the front and back pieces of the swimming suits  
13 at the crotch. Her completed work was placed in bundles  
14 which were put into a bin and later transferred to two  
15 other employees, who worked on the over-lock machines,  
16 Sherley Thompson and Mary Pina (Tr. 160-164).

17 Respondent's witnesses testified in detail concerning  
18 the drastic decline in the quality of Fumero's work  
19 immediately after the election and to the circumstances  
20 surrounding her remaining days of employment. Despite the  
21 fact that this preponderance of evidence was contradicted  
22 only by Fumero, (The General Counsel produced no other  
23 witness upon this phase of the case), the Board credited  
24 Fumero and discredited each of Respondent's witnesses,  
25 either for alleged lack of credibility or upon claims of  
26 implausibility, which were based upon the Board's choice



1 of inferences, unsupported by the evidence. It is Respon-  
2 dent's position that, upon consideration of the entire  
3 record, which must be reviewed in a proceeding for enforce-  
4 ment of an order of an administrative body, the Board  
5 acted unreasonably and in excess of its powers by its  
6 findings that Respondent constructively discharged Fumero  
7 and by its order requiring Fumero's re-instatement with  
8 back pay. A detailed examination of the evidence bearing  
9 upon this issue is essential, and the summary statement of  
10 facts contained in the Board's brief is totally insufficient.

11 Sherley Thompson had been employed in the swim suit  
12 department of Respondent for some five years prior to this  
13 proceeding (Tr. 155). She and another employee, Mary Pina,  
14 were working on over-lock machines and were engaged in the  
15 manufacturing process upon the swim suits which immediately  
16 followed the work being performed by Dulce Fumero and one  
17 other girl (Tr. 159; 161). It was Thompson's job to put  
18 the leg elastic on the swim suits after Fumero had finished  
19 stitching the crotches (Tr. 156). Thompson testified that  
20 although Fumero's work before the election was good, "\* \*  
21 \* all of a sudden, after the election, the work started  
22 coming through bad", and she couldn't work on it. (Tr. 156).  
23 Although one side of the swim suit was perfect, Fumero's  
24 work was defective, in that the other side was not done  
25 evenly and the jersey was sticking out of the suit (Tr. 158;  
26 165).



1           The operation in the swim suit department required the  
2 production of approximately 300 suits per day (Tr. 161),  
3 and every suit during the period in question which Thompson  
4 received from Fumero was so defective that she could not  
5 complete her work upon them (Tr. 166). Thompson immediately  
6 called Hazel Smith and informed her of the defect and of  
7 the fact that the work would have to be repaired before it  
8 could be completed (Tr. 167).

9           The bundles of swim suits, as they come through the  
10 various processes, have numbers placed upon them so that  
11 the work of the operators involved can be identified (Tr.  
12 157; 159; 169). Thompson testified that it was possible  
13 to recognize the difference in the stitch of the machines.  
14 She knew that it was the machine being operated by one of  
15 the two girls but did not know which of the girls it  
16 actually was until the number had been checked by the  
17 supervisor (Tr. 157; 170).

18           Thompson also testified that the work had to be  
19 repaired, and that she personally observed Fumero working  
20 on the returned work. She stated that she saw Fumero, who  
21 was supposed to be repairing the work, repair a total of  
22 only fifteen to twenty suits in an eight-hour working day  
23 (Tr. 157-158). Moreover, Thompson knew that a girl, whose  
24 name was Anna, had been required to come to work on a  
25 Saturday to do some of the repair work (Tr. 158).

26           As will be discussed hereafter, Thompson's testimony





1 was totally rejected by the Board upon the contention that  
2 her credibility had been destroyed because of supposed  
3 contradictions between her testimony at the hearing and  
4 a pre-trial statement concerning whether she knew that  
5 the defective work was Fumero's work, because she recog-  
6 nized the difference in the machine stitch.

7 Mary Pina, as noted above, was also employed on the  
8 over-lock machines for the purpose of putting the elastic on  
9 the swim suits (Tr. 174). Pina testified that three or  
10 four days after the election, the quality of Fumero's work  
11 changed (Tr. 175-176). According to Pina, girls worked by  
12 the bundle. They have a bin in which the swim suits are  
13 placed by the previous operator. They pick up the bundles  
14 and check the pieces in the bundles to see if the work is  
15 satisfactory. (Tr. 185). According to Pina, when she  
16 first noticed defects in Fumero's work, she found that  
17 every swim suit in the bundle was defective. This check is  
18 made because such an employee is a piece worker and, of  
19 course, does not get paid for the time spent in attempting  
20 to work on defective merchandise (Tr. 185-186). Pina  
21 supported Thompson's testimony that there was material  
22 sticking out from the crotch of the swimming suits worked  
23 on by Fumero, and that it was sticking out so much, she would  
24 have had to cut it which would have resulted in, as Pina  
25 vividly stated, "\* \* \* a curve inside of your crotch, and  
26 I mean that's no quality". (Tr. 188).



1           When the improperly sewn garments came to Pina's  
2 attention, she showed them to her supervisor, Hazel Smith.  
3 (Tr. 175-176). She told Smith that she could not cut the  
4 work, because it would result in the garment looking  
5 "horrible" (Tr. 176). Pina knew that Fumero's work had  
6 a ticket number on it, but she did not know which girl  
7 had performed the work (Tr. 176-177). After the defective  
8 work had been shown to Supervisor Smith, Pina observed  
9 Fumero doing repair work upon the same garments. The  
10 garments had to be ripped apart and put back together  
11 again, and Pina observed Fumero doing the repair work.  
12 She, too, testified that Fumero would only repair about  
13 fifteen or twenty suits in an eight-hour day (Tr. 177; 180).

14           In her own broken English, Pina most succinctly  
15 summarized Respondent's evidence when she stated at page  
16 179 of the Transcript as follows:

17           "A It was after the election. It was all that bad  
18 work she did, and there were two girls doing it.  
19 This other girl -- we had stopped doing that work,  
20 because it had to be repaired. It was practically  
21 a whole lot of it, and this other girl, we had to  
22 work behind, which I am on piece-work. I lose  
23 money, because she wouldn't supply two girls."

24 The other girl, according to Pina, was doing "good work".  
25 (Tr. 187).

26           Again, as will be discussed later in this brief, the



1 entire testimony of witness Pina regarding the defects in  
2 the work performed on the swim suits by Fumero and the  
3 necessity of repairing these suits before they could be  
4 finished was rejected by the Board, merely because Pina  
5 hesitated momentarily before admitting the identity of a  
6 Union organizer who had attempted to force a pamphlet  
7 upon Pina some seven months before the hearing.

8 Mitsuo Yoshida, Respondent's Plant Manager, was  
9 informed of the inferior work by supervisor Hazel Smith  
10 three or four days after the Union election. Smith  
11 called Yoshida to come upstairs and showed him the  
12 improperly sewn swim suits. Smith and Yoshida discussed  
13 the problem and were of the belief that the error had  
14 been made in the cutting operations performed on the  
15 garments before they were given to the operators to sew.  
16 However, they checked it out and discovered that the error  
17 was not made in the cutting, but that it was the operator's  
18 fault. The work was subsequently identified as Fumero's  
19 work from her clock number which was on the bundles of  
20 garments (Tr. 280-281). There were many bundles of  
21 inferior work, consisting of several hundred garments.  
22 All of the inferior work was that of Fumero and was not  
23 the work of the other girl. (Tr. 294-296). The bundles  
24 of inferior garments were assigned to Fumero to repair  
25 (Tr. 297). Yoshida observed Fumero ripping the crotches  
26 open and resewing them for a period of approximately



1 ten days. (Tr. 281; 297). In addition, other girls were as-  
2 signed to help her repair the defective suits (Tr. 297-298).

3 Respondent has a system of normal inspection by  
4 the supervisors. Once or twice in the morning and again  
5 in the afternoon, the supervisors will check the work of  
6 the employees (Tr. 282; 284). Each employee's work is  
7 inspected every day by the supervisor, and, according to  
8 Yoshida, a similar inspection was made of Fumero's work  
9 after the election. (Tr. 282). However, when Smith and  
10 Yoshida were standing approximately 20 to 25 feet away  
11 from Fumero's machine discussing the poor work then being  
12 performed by Fumero, Fumero called Smith a filthy name in  
13 Spanish. Yoshida did not understand the word in Spanish,  
14 and Smith refused to tell him, but started to cry and  
15 stated that she was not going to work any more. (Tr. 283).  
16 In order to continue with the regular inspection,  
17 Yoshida assigned another supervisor from a different  
18 section to check Fumero's work (Tr. 282). It was decided  
19 that Smith would not have anything to do with inspecting  
20 Fumero's work but would stay away from her (Tr. 284). In  
21 this connection, Pina testified that Smith and Yoshida  
22 were not discussing Fumero but were in fact discussing  
23 the work. She heard Fumero call Smith a whore in Spanish.  
24 (Tr. 181-183).

25 The following morning, Yoshida called Fumero into his  
26 office. Although Yoshida is, to a great extent, capable of





1 speaking Spanish, he uses the Castilian version, and, in  
2 matters of importance, he uses an interpreter to avoid mis-  
3 understandings. (Tr. 276). Thus, on this occasion, he had  
4 Geneveva Sanchez in the office with him. Yoshida told  
5 Fumero that she was a good operator, was capable of doing  
6 better work than she was doing; that he did not "\* \* \* want  
7 her to be calling anybody any names \* \* \*" and asked her to  
8 go about her business, do her work and mind her own  
9 business. Fumero had tears in her eyes and stated she  
10 wanted to go home, but Yoshida told her that it would not  
11 "look nice" and to take a drink of water, rest and go on  
12 back to work. (Tr. 285).

13 When the repair work was completed on the swim suits,  
14 Fumero was assigned a rather simple operation on what  
15 was referred to during the hearing as "robes". Yoshida  
16 personally observed her subsequent work upon the robes and  
17 testified that it was of poor quality. He stated that "\* \*  
18 \* the darts were sewn too short, so that the holes came  
19 in through the front". (Tr. 290). Fumero worked on these  
20 robes for approximately two to three weeks, and sixty to  
21 seventy percent of this work was also defective. Fumero  
22 was assigned to repair the defective robes, and other girls  
23 were also required to work on them (Tr. 298).

24 Fumero's last day of employment with Respondent was  
25 May 6, 1966. On this date, Fumero came to Yoshida with a  
26 slip from her doctor. She informed Yoshida that the doctor



1 did not want her to work, and that she was going to take  
2 time off for three to four weeks. Yoshida asked her if  
3 she was going to come back when she was better, and Fumero  
4 replied that she was not and was going to look for work  
5 elsewhere (Tr. 287).

6 Approximately three to four weeks later, Fumero called  
7 Yoshida and "\* \* \* asked me if I had work for her". (Tr.  
8 287). Yoshida requested her to come in and see him  
9 personally, which she did some four to five weeks later.  
10 Yoshida testified that:

11 "A She said she was on her way to the Employment  
12 Office, and that the doctor didn't -- couldn't  
13 give her anymore disability, that her disability  
14 was up.

15 "She actually said that she didn't want to  
16 work, and that she was going to go to the Employ-  
17 ment Office, and she wanted to know what I would  
18 answer on the form that came from the Employment  
19 Office when we got it, and I told her that I  
20 would tell the truth, that we have work for her,  
21 but she didn't want to work.

22 "She said, 'Well, if you want me to go back  
23 to work, I am going to do the same type of work.'

24 "I says, 'I couldn't afford to have you do  
25 the same type of work you done before.'" (Tr. 288).  
26 Yoshida also testified that Fumero told him that she



1 wanted to be off work while her children were out of school.  
2 (Tr. 289). Respondent had work available for Fumero at  
3 the time of this conversation (Tr. 288).

4 The records of Respondent, examined by Yoshida during  
5 the hearing, revealed that Fumero was given leaves of  
6 absence from July 18th through October 17th, 1964, and also  
7 from October 2nd through October 30th, 1965. (Tr. 289; 305).

8 David Young, the Secretary-Treasurer of Respondent, who  
9 was also in charge of liaison and contract work (Tr. 191),  
10 was advised by Yoshida of the inferior work then being  
11 performed by Fumero, shortly after Yoshida had first  
12 examined this merchandise. Young went upstairs to the  
13 machine where she was working. (Tr. 229; 245). Young ex-  
14 plained that there are two pieces of material in the swim  
15 suit operation, a front and a back with a jersey lining.  
16 These two pieces at the seam are required to be even on both  
17 sides so that in the next operation, when the elastic is  
18 put on, the elastic can be edged around the bottom of the  
19 swim suit. A tolerance of between 1/8th and 1/4th inch is  
20 permissible. However, as Fumero was then performing the  
21 operation, the swim suits were even on one side but were from  
22 a half inch to as much as an inch and a half off on the  
23 other side. In other words, "The work was uneven on one  
24 side on every garment \* \* \*". (Tr. 229-230). Young told  
25 Fumero that her work could not go through the next operation,  
26 and Fumero replied that "\* \* \*this is the best I can do".



1 (Tr. 230).

2 Shortly after Fumero had made some of the repairs on  
3 the swim suits which were made necessary by reason of her  
4 improper seaming, she was placed on the robes or beach  
5 "cover-ups". As witness Young explained, they did this  
6 because it was simplest operation that she could perform  
7 and because "\* \* \* she was fighting us on the other one,  
8 and we wanted to give her every chance and every benefit,  
9 \* \* \*". (Tr. 233). In this latter operation, Fumero was  
10 required to make the bust darts. "The dart is made by  
11 putting the side seam pieces together, \* \* \* and inverted  
12 and sewed at an angle in order to form a bust cup". (Tr.  
13 232). Darts are run between two marks or notches placed  
14 on the side seam of the material. A drill hole is drilled  
15 through the layers of material when they are being marked  
16 for cutting. After the dart is put into the garment,  
17 the hole is supposed to be hidden on the inside of the  
18 garment within the seams and becomes part of the inside  
19 seam. (Tr. 232-233). However, as explained by Young, when  
20 Fumero "\* \* \* sewed the darts she sewed them short so  
21 that when you open up the garment the holes show, and we  
22 have defective merchandise. (Tr. 233).

23 At the time that Young saw the defective work on the  
24 swim suits and Fumero had told him that she was doing the  
25 best she could, Young called Respondent's attorney for  
26 advice and was instructed by him to inform Fumero that





1 she had to do her work properly. (Tr. 246). Similarly,  
2 when the later problem arose with the improper sewing of  
3 the darts on the robes, Young told Yoshida to call the  
4 attorney again to find out what to do, because, as he  
5 stated "\* \* \* I never figured she would be messing up  
6 this work". (Tr. 248; See also, testimony of Yoshida at  
7 Tr. 286).

8 According to Young, approximately 400 or 500 swim  
9 suits were damaged by Fumero to the extent that they had  
10 to be repaired. Fumero worked on the repairs for  
11 approximately two weeks, and, in addition, some of the  
12 garments were given to Eva, who came in on several  
13 Saturdays to help with the repairs. (Tr. 250-251). Even  
14 after the initial group of suits was repaired, Fumero's  
15 work on the swim suits was very inconsistent. As Young  
16 put it, "We would get a good day's work, and then we would  
17 get a day's work that was three quarters, and then we had  
18 to return some to her". It was for this "exasperating"  
19 reason that Fumero was placed on the robes, which operation,  
20 Young explained, could be taught to anyone within five  
21 minutes. (Tr. 252).

22 Young also testified, in his direct examination, that  
23 on three occasions Fumero had asked him for a layoff so  
24 that she could collect her unemployment insurance. (Tr.  
25 211; 212; 218-219). The Board discredited Young entirely  
26



1 on the basis of his testimony upon this matter.

2 Hazel Smith was Fumero's immediate supervisor in the  
3 swim suit department. According to Smith, she had never  
4 had trouble with Fumero prior to the election and was  
5 friendly with her. (Tr. 339). About five days before the  
6 election, Fumero stated that Young was going to give  
7 her a layoff. Smith did not believe this, because there  
8 was work to be done. She called Young who denied telling  
9 Fumero that she was to have a layoff, and Smith told her  
10 to go back to her machine, because there was a lot of work.  
11 (Tr. 340). Smith corroborated in full detail the testimony  
12 of Thompson, Pina, Yoshida and Young. Both Pina and  
13 Thompson called Smith's attention to Fumero's work on the  
14 swim suits, and Smith testified that she told them that the  
15 suits could not be cut as much as would be necessary because  
16 of the manner in which they were sewn. (Tr. 340). As  
17 Yoshida testified, Smith confirmed that she called him to  
18 come up to see the bad work that had been accumulating in  
19 the bin. (Tr. 340-342). The conversation with Yoshida  
20 occurred at about five minutes after 4:00 P.M. and took place  
21 at a table close to Sherley Thompson's machine. (Tr. 349).  
22 A boy from the cutting room who had been blamed for the bad  
23 work was also present (Tr. 350). Fumero, who was not a  
24 part of the conversation, came by Smith and Young and used  
25 the profane word, as related by Yoshida. Smith told  
26



1 Yoshida that she was quitting and later began to cry. (Tr.  
2 343). A day later, Smith went to check Fumero's work and  
3 was told by Fumero, "Don't bother checking my work. Don't  
4 lose your time". (Tr. 344). Smith responded that she would  
5 check her work even if Fumero was there for six years.  
6 Later, Smith told Yoshida that she did not want to check  
7 Fumero's work any more, and they should have someone else  
8 do it. It was at this time that Sanchez took over the  
9 inspection. (Tr. 344). Smith explained to Sanchez how  
10 the work should be done and how it should look after it was  
11 finished. (Tr. 354).

12 According to Smith, Fumero did repair some of the work  
13 on the swim suits, as did other employees in the plant. (Tr.  
14 345). Smith also personally observed Fumero's performance  
15 on the robes and testified that it was poor work which had  
16 to be repaired, because Fumero was finishing the dart before  
17 the punch hole so that the punch hole would show on the  
18 outside. (Tr. 346). The improper performance on the  
19 robes lasted for about a week, and from that time until  
20 her termination, Smith was of the opinion that the quality  
21 of Fumero's work was satisfactory. (Tr. 347).

22 Geneveva Sanchez had been employed by Respondent since  
23 1954, and at the time of this proceeding was employed as a  
24 supervisor. She first learned of the problem with Fumero's  
25 sewing when Yoshida told her to inspect Fumero's work  
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1 following Smith's refusal to do so after having been called  
2 a filthy name by Fumero. (Tr. 309). As Sanchez was not  
3 familiar with the fabrication of swim suits, the work was  
4 shown to her, and she was told what was to be inspected.  
5 (Tr. 310). Because she had her own department and had to  
6 check the girls in her department, she would leave that  
7 department and go down and check Fumero's work; however,  
8 she apparently did little checking on the repairs of the  
9 swim suits, for, as she testified, she inspected mostly  
10 the robes. (Tr. 327). She did, however, see Fumero ripping  
11 the defective swim suits and saw the other girls working on  
12 Saturdays making the repairs. (Tr. 310). For approximately  
13 one week, Sanchez checked Fumero's work on the robes, and  
14 she found quite a few which had to be fixed. Her estimate  
15 was approximately fifty pieces. (Tr. 312-313). The problem  
16 with Fumero's work in this connection was summarized by  
17 Sanchez as follows:

18 "It is run in a straight line, so it covers the  
19 hole, the punch-hole, and if you can't see the  
20 punch-hole, then, you're blind, because all you  
21 have to do is pass it, and you pass it all right,  
22 but you stop before it is no good."

23 Sanchez inspected Fumero's robes for from five to eight  
24 days. She then stopped inspecting them "\* \* \*" because she  
25 was making them very nice." (Tr. 329).  
26





1 Sanchez also corroborated Young's testimony that Fumero  
2 could speak English well, if she wanted to, and she under-  
3 stood English. (Tr. 321). However, Sanchez customarily  
4 spoke to her in Spanish.

5 According to Sanchez, Fumero, after the election,  
6 told her many times a day that she wanted to get laid off  
7 and, in fact, asked her about it five times in one morning.  
8 (Tr. 315). Later, Fumero was off for a few days and when  
9 she returned, she told Sanchez that she was ill and would  
10 have to take some time off. Sanchez called Yoshida, who  
11 requested that she bring Fumero to his office downstairs.  
12 Sanchez testified that on this occasion Fumero did, in  
13 fact, state that she was going to take time off so that  
14 she could collect "disability", and that she had no  
15 intention of coming back, as she would like to work else-  
16 where. (Tr. 315-316). Finally, Sanchez confirmed Yoshida's  
17 testimony that Fumero, after her disability period was  
18 over, wanted to collect unemployment insurance until her  
19 children were out of school. (Tr. 335).

20 The issue before the Board, raised by Respondent's  
21 evidence, was whether Dulce Fumero, deliberately or  
22 otherwise, spoiled several hundred garments, and whether  
23 Respondent was, therefore, justified in refusing her re-  
24 employment after her return from several weeks' absence for  
25 alleged medical reasons. The Board's findings that  
26



1 Respondent harassed Fumero into leaving her employment and  
2 later discriminatorily refused to re-employ her, were based  
3 entirely upon Fumero's testimony and upon the complete and  
4 absolute exclusion of all of the evidence given by  
5 Respondent's witnesses. Despite the fact that the Board  
6 discredited much of Fumero's testimony upon other issues,  
7 the Board credited her testimony in its entirety upon this  
8 phase of the case, applying a far less rigid standard to her  
9 testimony than it applied to Respondent's witnesses.

10 The contradictions and exaggerations in Fumero's  
11 testimony, and the most evident lack of credibility therein,  
12 will be discussed in a succeeding section of this brief.  
13 Insofar as the issue of her work performance is concerned,  
14 it is safe to say that Fumero dismissed the entire matter.  
15 She admitted that during the first week after the election,  
16 Yoshida returned some 500 pieces to her for repair. (Tr. 32).  
17 Although denying that some of the work was hers, Fumero  
18 admitted that she spent about four or five days repairing  
19 the work. (Tr. 34-35). However, she then testified that she  
20 changed "nothing" on these pieces, and that "It is just one  
21 big party that they had around me there". (Tr. 36; 67).  
22 Later, Yoshida told her that she was finished repairing and  
23 that she was being placed on a new job (Tr 37), because  
24 Smith would not accept any more of her work without  
25 inspection. (Tr. 38). On the occasion of this conversation,  
26 Fumero testified most significantly that:



1 "So then I said to him, what else do you  
2 pretend to do with me, with all of this intrigue  
3 and all of these calls, that I was not a new  
4 operator, neither an irresponsible person, and  
5 that for the period of three years that I had  
6 worked on different jobs at this plant, so that  
7 at the end I would be the object for a show for  
8 everyone, to take me out of the plant with a  
9 document -- to give me a layoff with a document  
10 so that I could work elsewhere.

11 "So then he said that I would have to accept  
12 that because he was the boss there, that he had  
13 a list from the employment soliciting employees --  
14 to give me my layoff, that I could go, or do  
15 whatever I want that he -- that it didn't concern  
16 him."

17 (Tr. 38).

18 Regarding Yoshida's alleged reference to solicitations  
19 for employment, she then testified that he meant from the  
20 California Department of Employment and that he said he  
21 could not give her a layoff. (Tr. 39). Upon being asked to  
22 repeat the conversation, Fumero added the fact that "\* \* \*  
23 so then I told him that I would work half a day, or two  
24 hours, or no work at all, and he told me that you do what  
25 you want, because there is a law here at the plant, so that  
26 day I left at half a day, and I left all of that work there



1 to him". (Tr. 39).

2 Fumero admitted that she was placed upon the work of  
3 sewing "darts" on the robes (Tr. 41-43) and admitted that  
4 many of them were returned to her because they were  
5 defective, but claimed that "\* \* \* no one sews with such an  
6 exactness, that no one sews with such an exactness that it  
7 is necessary to be measuring piece by piece with care".

8 (Tr. 45). She also complained that she was being inspected  
9 constantly and that she could not "\* \* \* support this kind  
10 of a thing, \* \* \*". (Tr. 49). On this occasion, she had  
11 spoken to Yoshida about her working conditions in the  
12 presence of Sanchez and Efram Young, and testified that  
13 the latter commented, in her words, "\* \* \* if I thought  
14 that trying to disrupt a good work or employment permitted  
15 good treatment, \* \* \*", but she then claimed that he  
16 refused to discuss the matter with her. (Tr. 49).

17 A few days later, Fumero told Young that she could  
18 no longer continue working there; that it was impossible  
19 for her to continue; that every day was a different  
20 problem; that she was sick and could no longer "resist"  
21 days like that. She then said that Young offered to talk  
22 to Yoshida and told her that he would pay her the same  
23 that she had been earning. (Tr. 50).

24 Fumero had "an extreme case of nerves" that started  
25 at the first Union meeting at her house in February, and  
26 had been under a doctor's treatment during the entire





1 period. (Tr. 53). On her last day of employment (May 6,  
2 1966), she told Yoshida that her ailment was not improving;  
3 that her doctor told her she needed a complete rest; that  
4 she was not going to work; and that after she got well,  
5 she would have to return to work (Tr. 52).

6 During June, 1966, Fumero telephoned Yoshida after  
7 being released by her doctor. Yoshida told her to come in  
8 to see him in person, as he did not wish to talk on the  
9 telephone because of language difficulties (Tr. 54). When  
10 she saw him a day later, she claimed that she was told, in  
11 response to her question, "\* \* \* if he had any work for  
12 me, \* \* \*", that he was sorry but it was impossible  
13 because Smith was boss and she became nervous with Smith.  
14 To this statement, Fumero replied, "\* \* \* okay, that's  
15 what I wanted to know". (Tr. 55).

16 C. Statement Of The Board's Findings Of Lack Of Credibility  
17 Of Respondent's Witnesses.

18 The Board held that Respondent's so-called fault-  
19 finding with Fumero's work performance "\* \* \* was a sham  
20 aimed at humiliating and punishing her because she was a  
21 union activist" (R. 42); that Fumero was a target of  
22 managerial discrimination (R. 43); and of a plan to humili-  
23 ate and harass her into quitting her employment (R. 44).  
24 These findings and conclusions by the Board were bottomed  
25 upon its total rejection of all of the evidence of Respon-  
26 dent's witnesses. The fact is that the detailed testimony

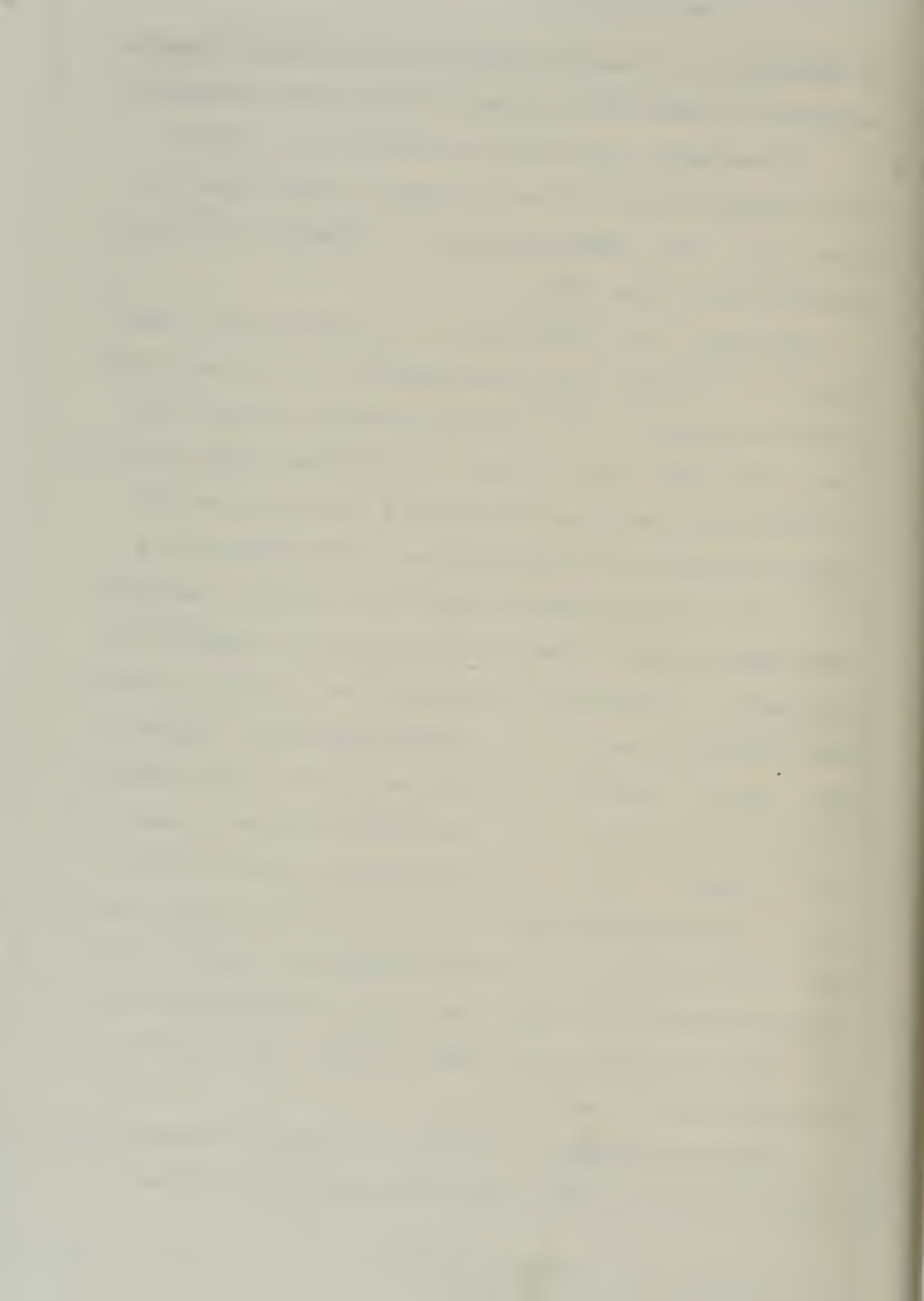


1 of Respondent's witnesses concerning the inferior sewing  
2 performed by Fumero was scarcely discussed by the Board.

3 The evidence upon which the credibility findings  
4 were actually based must be discussed in some detail in  
5 order that a full understanding of the Board's error may  
6 be made clear to the Court.

7 Mary Pina: Her testimony was rejected by the Board  
8 upon the contention that "Pina appears to have some bias  
9 against the Union's organizational effort, and was less  
10 than candid about it". (R. 40). This alleged bias and lack  
11 of candor were based entirely upon a few questions and  
12 answers concerning her recognition at the hearing of a  
13 Union organizer and whether during the election campaign,  
14 some seven months earlier, she had told the organizer to  
15 drop dead. In response to the question of whether she had  
16 seen the person before, the witness responded, "Maybe I  
17 have. Maybe I haven't". When asked by the Trial Examiner  
18 if she recognized the lady, the lady's recorded answer was  
19 "No --I guess I have". Pina admitted the woman looked  
20 familiar and then was asked if in fact she told the lady to  
21 drop dead, to which the witness responded, "Maybe I did".  
22 The questioner interrupted the witness' complete answer,  
23 that "She was forcing that paper on me". (Tr. 188-189),  
24 which she did not want.

25 Sherley Thompson: A similar challenge was made to the  
26 credibility of Thompson, the other over-lock machine



1 operator who followed Fumero's work. In Thompson's case,  
2 she was charged by the Board with testimony "attended by"  
3 self-contradiction. (R. 41). This entire charge was based  
4 on the claim that she first testified that she was familiar  
5 with the "machine stitch" of Fumero and recognized it and  
6 then "altered course" and claimed she did not know which  
7 of the operators had done the work. It was also contended  
8 that her testimony at the hearing was contrary to a pre-  
9 trial statement.

10 Thompson testified on direct examination that after  
11 the election, "\* \* \* the work started coming through bad".  
12 She was asked if she knew whose work it was and her  
13 response was "No". (Tr. 156). On cross-examination, she  
14 was asked if she knew from whom the suits came, and her  
15 answer was that she didn't know until after the supervisor  
16 told her. (Tr. 168). Thompson repeated this answer after  
17 being questioned about the use of the ticket numbers to  
18 identify an operator's work. She was then asked the  
19 following questions and gave the following answers:

20 "Q Couldn't you tell from the stitch of the machine?

21 "A You mean, could I tell it was Dulce's work or not?

22 "Q Yes.

23 "A No two machines have the same stitch. Each  
24 machine has a different stitch.

25 "Q Could you recognize Dulce's machine stitch?

26 "A Yes.



1 "Q And did you recognize it when you saw this  
2 defective work?

3 "A Yes.

4 "Q So you did know that it was Dulce's work right  
5 when you looked at it the first time?

6 "A As I say, I didn't know who it was. It was  
7 between one of the two girls, and I didn't know  
8 which one it was."

9 (Tr. 170).

10 Thompson is also charged with changing her testimony  
11 regarding her complaint to management concerning the  
12 defective work. She testified on direct examination (Tr.  
13 157) that she talked to Hazel Smith and that Smith called  
14 Yoshida. In a pre-trial statement, Thompson said that she  
15 "complained to Mitch". (Tr. 172). So far as her recogni-  
16 tion of Fumero's work is concerned, Thompson's pre-trial  
17 statement contained one sentence on the subject: "I knew  
18 it was her's because each machine's stitch is different,  
19 and the operator's clock number is on the bundle, and each  
20 girl ties the bundle differently". (Tr. 172).

21 David Young: Young was charged by the Board with the  
22 disposition to shape his testimony to what he conceived to  
23 be the necessities (R. 29) and, again, with the propensity  
24 toward self-contradiction and exaggeration (R. 42).

25 In his direct examination, in response to a question  
26 concerning Fumero's testimony that Young had said he would





1 lay her off after the election, his response was that the  
2 only conversation was that "\* \* \* she asked me on more  
3 than one occasion to lay her off so she can collect  
4 unemployment insurance". (Tr. 210).

5 He was specifically asked about only three of the  
6 conversations during his direct examination. (Tr. 210-213;  
7 218). On cross-examination, the witness was first asked  
8 about the three conversations concerning which he was  
9 questioned by counsel for Respondent. (Tr. 236-238). On  
10 resumed cross-examination, he was again asked regarding the  
11 number of conversations and responded that it would be  
12 only an approximation, but at least a half dozen times,  
13 if not more. (Tr. 241). The Board contended that Young's  
14 pre-trial statement that: "She asked me twice about being  
15 laid off" (Tr. 244), was evidence impeaching the credibility  
16 of his testimony at the hearing.

17 In regard to a conversation with Fumero concerning  
18 layoff at which Geneveva Sanchez was present, Young was  
19 asked by the Trial Examiner where the conversation took  
20 place, and then if the witness recalled why Sanchez was  
21 present. Young responded that he could have called her in  
22 "\* \* \* because Dulce speaks English very well, but when  
23 she gets a little bit excited she can put wrong words into  
24 the -- I wanted to make sure I understood what she said".  
25 (Tr. 219). Again, the Board, affirming the finding of the  
26 Trial Examiner that Fumero did not speak English, used



1 this testimony as further grounds for contending that  
2 Young lacked credibility by reason of a gratuitous injec-  
3 tion of this claim into his testimony in the expectation  
4 of discrediting Fumero.

5 Geneveva Sanchez: The Board disbelieved all of the  
6 testimony of Geneveva Sanchez upon the claim that it was  
7 "exaggerated" (R. 42). The sole basis of this claim of  
8 exaggeration was the testimony of Sanchez that Fumero,  
9 after the election, told her many times a day that she  
10 wanted to get laid off and once asked her about it five  
11 times in a morning. (Tr. 314-315). The Board disbelieved  
12 the testimony on the grounds that it did not think that  
13 Fumero would come to Sanchez with such a statement during  
14 the short period of time that Sanchez was inspecting  
15 Fumero's work. The Board also contended that it was not  
16 plausible, because the function of laying off personnel  
17 belonged to Yoshida, even though Sanchez also testified  
18 that she told Fumero to go see Yoshida or Young because  
19 "That wasn't my department". (Tr. 315).

20 Mitsuo Yoshida: The Board rejected Yoshida's evidence  
21 in all of its substantial particulars concerning the poor  
22 quality of work being done by Fumero; the amount of  
23 inspection performed on her work and its alleged difference  
24 from ordinary inspection; and finally his conversations with  
25 Fumero and her alleged statements both at the time she quit  
26 her employment and at the time she allegedly returned



1 seeking re-employment. It is difficult to determine the  
2 exact basis upon which much of Yoshida's evidence was  
3 disbelieved, for the reason that in many instances the  
4 Board's alleged disbelief is coupled with its findings  
5 upon the evidence of other witnesses or its apparent  
6 selection of inferences raised by various phases of the  
7 testimony. However, it is probable that the root of the  
8 Board's disbelief of Yoshida is in its rejection of  
9 Yoshida's version of his conversation with Juana Yanez.  
10 (See, R. 28 and 29). Yanez testified that Yoshida  
11 approached her at her machine, told her he wanted to speak  
12 with her, and that she went to his office. She then  
13 testified to the conversation which was adopted by the  
14 Board in a portion of its findings relating to the 8(a)(1)  
15 phase of the case. The examination of Yanez was first  
16 attempted in English, and her answer to the questions  
17 concerning this conversation were then repeated through  
18 the interpreter. The answers were vague and disconnected,  
19 and it is utterly impossible to determine from the answers  
20 exactly what took place. Specifically, it cannot be  
21 determined from the direct testimony of Yanez whether, in  
22 fact, she brought up the Union or Yoshida did. The Board,  
23 however, assumed that Yanez meant by her answers that  
24 Yoshida broached the subject of the Union. Yoshida was  
25 not questioned extensively during his direct examination  
26 about this conversation, but it is fair to say his version



1 did differ in many particulars with the version of Yanez.  
2 However, the Trial Examiner asked the witness how the  
3 matter of the Union came up, and the witness' response was  
4 "I don't know whether she brought it up or whether I  
5 brought it up". (Tr. 268). The Board contends that this  
6 answer, along with his "unwillingness" to explain why he  
7 did not want to talk to Yanez at her machine, showed  
8 Yoshida to be an evasive witness. (R. 28-29).





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III

STATEMENT OF QUESTIONS PRESENTED IN  
OPPOSITION TO PETITION FOR ENFORCEMENT

1. Whether the Board's Order, which was based solely upon the uncorroborated testimony of the charging-witness, is supported by substantial evidence upon the record as a whole or is so clearly erroneous that enforcement must be denied?

2. Whether the Board arbitrarily and erroneously rejected the entire evidence of each of Respondent's six witnesses for alleged lack of credibility without cause or reason to believe that these witnesses willfully gave false evidence upon material issues?

3. Whether the Board arbitrarily and erroneously applied rigid and severe standards of credibility to Respondent's witnesses but failed to apply similar standards to the charging-witness and wholly excused her testimonial shortcomings?

4. Whether the ultimate fact found by the Board, i.e., that Respondent discriminatorily harassed Fumero into quitting her employment by needless faultfinding, was based upon an inference, entirely unsupported by any evidence in the record, that she would not have courted discharge by deliberately doing poor work because she needed employment for support of herself and her children?



1           5. Whether the aforesaid ultimate fact was also based  
2 upon an entirely speculative and conjectural inference,  
3 without evidentiary support, that Fumero, a formerly good  
4 worker, would not and could not have become suddenly incom-  
5 petent?

6           6. Whether the inference drawn by the Board that  
7 Respondent engaged in needless faultfinding was unreasonable  
8 by reason of the fact that the Board supported such infer-  
9 ence by selection of certain favorable testimony of Respon-  
10 dent's witnesses and by improperly rejecting unfavorable  
11 testimony upon the same subject matter?

12           7. Whether the Board failed to make a reasonable  
13 choice of the possible inferences raised by the entire  
14 evidence and failed to consider the only reasonable infer-  
15 ence that Fumero's poor work performance was caused by her  
16 nervous illness?



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IV

SUMMARY OF ARGUMENT

The findings and conclusions of the Board are not supported by substantial evidence upon the record as a whole and are so clearly erroneous that the Board's petition for enforcement must be denied. This Court is not merely a judicial echo of the Board; it has the power and duty to set aside an order of the Board whenever the Court cannot conscientiously find that the evidence supporting the decision is substantial or when it is left with the conviction that error has been committed.

The Board arbitrarily credited only the testimony of the alleged discriminatee, a highly prejudiced and interested witness, and discredited all of the testimony of Respondent's witnesses to the contrary. Respondent's witnesses were charged with lack of credibility by reason of testimony upon peripheral matters not directly related to the principle issues and were not found to have given willfully false testimony upon a material question. Therefore, the harsh doctrine of falsus in uno, falsus in omnibus was erroneously applied by the Board. Furthermore, a dual standard of credibility was applied, in that the inconsistencies, exaggerations and contradictions of the charging-witness were excused, but the witnesses for Respondent were held to an impossibly rigid standard.



1 Inferences were drawn by the Board that were not sup-  
2 ported by any evidence in the record or which were purely  
3 speculative and conjectural. In order to sustain its  
4 conclusions of ultimate fact, the Board improperly drew  
5 inferences by selection of certain testimony of witnesses,  
6 while ignoring or rejecting other testimony upon the same  
7 subject matter. The Board failed to examine and consider  
8 all of the reasonable inferences raised by the facts esta-  
9 blished by the record. Its choice of inferences was  
0 unreasonable and cannot be sustained upon fair consideration  
1 of all of the evidence which detracted from the conclusions  
2 reached.

3 The only fair, just and reasonable conclusion from the  
4 evidence in the record is that Respondent did not discrimi-  
5 nate against Dulce Fumero, either before her voluntary  
6 separation from employment or at the time she later returned  
7 when her disability excuse had expired. Fumero, suffering  
8 from a nervous illness, damaged more than 500 garments  
9 through careless and inferior work. Contrary to the Board's  
0 accusation of "needless faultfinding", Respondent patiently  
1 tolerated her deficiencies. Fumero eventually quit her  
2 employment voluntarily for medical reasons. She did not  
3 return upon a genuine search for employment, but only to  
4 obtain an excuse enabling her to obtain unemployment insur-  
5 ance benefits, and, in any event, Respondent had a lawful  
6 right to refuse to re-employ Fumero by reason of her prior





1 faulty work performance.

2 The uncorroborated testimony of the person who will  
3 benefit from a favorable decision cannot constitute the  
4 measure of substantial evidence required to support a deci-  
5 sion. Labored and strained inferences improperly drawn  
6 without support from the evidence, coupled with unjustifiable  
7 impeachment of all of the witnesses for Respondent, cannot  
8 be permitted to overcome the clear weight of the evidence  
9 in the entire record.

10 Respondent respectfully submits to the Court that the  
11 findings of the Board, upon the record of this proceeding,  
12 do not reflect the truth and right of the case, and enforce-  
13 ment of the Board's order against Respondent would be  
14 manifestly unjust.



ARGUMENT

A. The Board's Petition For Enforcement Should Be Denied For The Reason That The Decision Is Not Supported By Substantial Evidence And Is Clearly Erroneous.

The findings of the Board upon the issue of the alleged discrimination by Respondent against Dulce Fumero are "so against the great preponderance of credible testimony", that these findings do not "reflect the truth and right of the case". (2B Barron & Holtzoff 549-550). A finding is clearly erroneous when "'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'". (McAllister v. U.S., 348 U.S. 19, 20; 75 S. Ct. 6, 8).

Contrary to the contentions of the Board, this Court is bound by neither the Board's rulings upon the credibility of witnesses nor by its Findings of Fact. "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both". (Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490; 71 S. Ct. 456, 466).



1           The United States Supreme Court in its decision in the  
2 Universal Camera case defined the scope of review of an  
3 administrative record by a Court of Appeals. The Court held  
4 that the entire record must be taken into consideration and  
5 that "\* \* \* a reviewing court is not barred from setting  
6 aside a Board decision when it cannot conscientiously find  
7 that the evidence supporting that decision is substantial,  
8 when viewed in the light that the record in its entirety  
9 furnishes, including the body of evidence opposed to the  
10 Board's view". (340 U.S. 474, 488; 71 S. Ct. 456, 465). It  
11 is generally true that Appellate Courts will not substitute  
12 their judgment for that of the Board upon matters of  
13 credibility or upon choices of possible inferences. Never-  
14 theless, "Administrative determinations of credibility are  
15 often set aside because the reviewing court firmly believes  
16 that the evidence supporting the determination is clearly  
17 less credible than the opposing evidence". (4 Davis;  
18 Administrative Law 145, § 29.06). And, where the Board has  
19 drawn unreasonable inferences from the evidence, this Court  
20 will deny enforcement of the Board's order. (N.L.R.B. v.  
21 Sunset Minerals, Inc. [CA-9 1954], 211 F. 2d 224).

22           The primary issue of fact before the Board in this  
23 phase of the proceeding was whether Fumero, consciously or  
24 unconsciously, damaged more than 500 garments because of  
25 inferior work performance or whether, as found by the Board,  
26 Fumero was harassed and humiliated into quitting her employ-



1 ment by the "sham" insistence of Respondent that her work  
2 was faulty. As a subsidiary issue, there was the question  
3 whether, after returning from leave of absence, Fumero was  
4 genuinely seeking employment, as asserted by the Board, or  
5 whether she was, in fact, attempting to obtain an excuse  
6 from Respondent that would permit her to obtain unemployment  
7 insurance benefits.

8 Six witnesses, including both supervisors, and non-  
9 supervisory employees, testified in Respondent's defense.  
10 Their testimony was without contradiction or inconsistency  
11 upon any material issue. The evidence given by these wit-  
12 nesses was clear and convincing upon two significant issues.  
13 First, that Fumero did, in fact, commence performing her  
14 assigned task in a most inferior manner shortly after the  
15 election, and, secondly, that upon her return from a leave  
16 of absence due to nervous illness, she was not seeking  
17 employment, but wanted an excuse that would enable her to  
18 draw unemployment benefits. Respondent's witnesses testified  
19 to their observations of her defective sewing upon the swim-  
20 suits and upon the beach robes; to the fact that she, as  
21 well as other employees, spent many days ripping apart the  
22 seams of these damaged garments and repairing them; to her  
23 insubordinate insult to her supervisor; and finally to her  
24 efforts to obtain an excused layoff.

25 Although it is true that Fumero denied the evidence  
26 of Respondent's witnesses, albeit with many contradictions,





1 the preponderance of the evidence convincingly supported  
2 Respondent's contentions. The record leaves no room for  
3 doubt that Fumero's work suffered a drastic decline in  
4 quality before she finally left her employment because of  
5 her illness and that Respondent had good and sufficient cause  
6 for refusing to re-employ her even had she genuinely sought  
7 to return. There is utterly no support in the entire record  
8 for the inference drawn by the Board that Respondent engaged  
9 in needless faultfinding for the purpose of humiliating  
10 Fumero and discriminatorily refused to re-employ her.

11 Even though the Board did not, and upon this record  
12 could not, charge the witnesses for Respondent with giving  
13 willfully false testimony, nevertheless, the Board rejected  
14 all of the evidence of Respondent's witnesses and relied  
15 entirely upon the uncorroborated testimony of Fumero and  
16 "upon tidbits of evidence picked from here and there" from  
17 the record (N.L.R.B. v. Mallory & Co. [CA-7 1956], 237 F. 2d  
18 443). Fumero was not a wholly trustworthy witness whose evi-  
19 dence was reliable to the exclusion of all else. She first  
20 admitted that she worked upon the repairs in one answer and  
21 then changed course and asserted that there was really  
22 nothing to be repaired and contended that it was just a "big  
23 party". Later, Fumero denied that she ripped and repaired  
24 even for "one moment". She admitted that the robes were  
25 returned to her, because they were defective, but complained  
26 that she was being asked to sew with too much exactness. She



1 admitted that she had had an "extreme case of nerves" which  
2 had commenced with the first Union meeting at her home in  
3 February and admitted that she asked for time off at the  
4 suggestion of her doctor.

5 And, again, even though denying that in June, 1966, she  
6 was actually seeking an excuse that would enable her to draw  
7 unemployment benefits for the summer, Fumero testified quite  
8 significantly that when Yoshida told her she could not work  
9 there any more, her reply was, "Okay, that's what I wanted  
10 to know". This was hardly the response to be expected of a  
11 person who desperately needs employment, as inferred by the  
12 Board. On the contrary, it is the response that might be  
13 expected from an individual who had just obtained the de-  
14 sired excuse for the employment office.

15 Despite the fact that forty-three employees of Respon-  
16 dent voted for the Union in the election and, presumably,  
17 had direct knowledge of the circumstances surrounding  
18 Fumero's last weeks of employment, the General Counsel  
19 failed to call a single one of these employees to rebut  
20 Respondent's case.

21 Fumero's evidence on this point was entirely presented  
22 through the words of an interpreter and was brief to the  
23 point of being sketchy. It is also significant that when  
24 she was recalled upon rebuttal at the conclusion of Respon-  
25 dent's case, she was examined by the General Counsel only  
26 with reference to the questions concerning her statements



1 regarding her desire for a layoff and whether she told  
2 Yoshida that she did not wish to return to work.

3 The findings of a Trial Examiner, affirmed by the  
4 Board, that "\* \* \* are based primarily on the uncorroborated  
5 testimony of the party who stands to benefit from an award  
6 of re-instatement and back pay \* \* \* may not constitute  
7 substantial evidence". (N.L.R.B. v. Ogle Protection Service  
8 [CA-6 1967], 375 F. 2d 497, 506 [cert. den. Oct. 9, 1967, 36  
9 LW 3144]; citing its earlier decisions in N.L.R.B. v. Elias  
10 Brothers Big Boy, Inc., 327 F. 2d 421, N.L.R.B. v. Barberton  
11 Plastics Products, Inc., 354 F. 2d 66).

12 The Ogle Protection Service, Barberton Plastics Products  
13 and Elias Brothers cases are square authority for, and  
14 strongly support, Respondent's position. In each of these  
15 three cases, the Board found violations of Section 8(a)(1)  
16 for reasons of interference, coercion and restraining of Union  
17 activities, but also found that these employers had violated  
18 Section 8(a)(3) on the grounds that employees were discrimi-  
19 natorily discharged for union activities. These findings  
20 were based solely upon the uncorroborated testimony of the  
21 purposed discriminatees to the complete exclusion of all of  
22 the evidence of the witnesses for the employers. The Court  
23 of Appeals for the Sixth Circuit in the Elias case succinctly  
24 summarized the situation in both the cited cases and in the  
25 cause now before this Court by stating that "\* \* \* the Trial  
26 Examiner has credited the testimony of a highly prejudiced



1 and interested witness and discredited the testimony of all  
2 witnesses to the contrary". Enforcement was denied in these  
3 cases, as it should be herein, for lack of substantial evi-  
4 dence to support the order of the Board.

5 The Court of Appeals for the Fifth Circuit, in N.L.R.B.  
6 v. Borden Co. (1968), \_\_\_\_ F. 2d \_\_\_\_, 67 LRRM 2677, also  
7 recently refused to enforce an 8(a)(3) order of the Board  
8 that was based entirely upon testimony of the discharged  
9 employee. This Court held that:

10 "The only facts in the record supporting anti-  
11 unionism as a motivating factor in Vasquez's dis-  
12 charge are related by Vasquez himself; 'the be-  
13 ginning and the end of the thread, and everything  
14 between, are supported by testimony of no one else.'  
15 N.L.R.B. v. Texas Industries, Inc., No. 24255, Dec.  
16 28, 1967, at p. 5, 67 LRRM 2114. Many of these  
17 facts are not uncontradicted. Thus, while 'the  
18 initial choice between two equally conflicting  
19 inferences of discriminatory or non-discriminatory  
20 employer motivation for an employee discharge is  
21 primarily the province of the Board,' 'the review-  
22 ing court must not confine itself to the consi-  
23 deration of evidence "which when viewed in  
24 isolation", supports the Board's findings, but  
25 must also take "into account contradictory evidence  
26 or evidence from which conflicting inferences could





1 be drawn." . . . "The substantiality of evidence  
2 must take into account whatever in the record  
3 fairly detracts from its weight. . . .'"

4 The clear preponderance of the evidence in this record  
5 sustains the position of Respondent that it did not commit  
6 an unfair labor practice insofar as the employment of Dulce  
7 Fumero is concerned. Nevertheless, the Board, credited the  
8 uncorroborated testimony of Fumero; discredited Respondent's  
9 witnesses; and drew inferences of unlawful motivation which  
10 were totally unreasonable and significantly unsupported by  
11 any evidence in the record. These matters will be discussed  
12 in the succeeding sections of this brief.

13 B. The Board Failed To Apply Proper, Legal Standards In Its  
14 Evaluation Of The Credibility Of Respondent's Witnesses.

15 The Board discredited the testimony of Respondent's  
16 witnesses upon the grounds that they were guilty of evasion,  
17 exaggeration, self-contradiction and of interest in the  
18 proceedings. In no instance was the testimony seized upon  
19 by the Board as evidence of lack of credibility, testimony  
20 which was being given upon the principal issue in the case.  
21 To the contrary, the inconsistencies in the testimony of  
22 the witnesses were minor and related primarily to peripheral  
23 matters. A trial judge does not have to believe a witness  
24 if there is reasonable cause not to believe him, but a court  
25 may not arbitrarily reject the testimony of a witness whose  
26 testimony appears credible. (Ge Chee On v. Brownell, 253



1 F. 2d 814; Yip Mie Jork v. Dulles, 237 F. 2d 383).

2 The Board, in fact, applied the doctrine of "falsus in  
3 uno, falsus in omnibus" to Respondent's witnesses, while  
4 specifically rejecting application of the doctrine to the  
5 contradictory and exaggerated testimony of Fumero. (R. 31).  
6 This harsh rule has "little or no place in modern jurispru-  
7 dence". (Virginia R.R. Co. v. Armentrout, [CA-4 1948], 166  
8 F. 2d 400, 405 [upon instructions to jury]). The doctrine,  
9 "\* \* \* so far as it has any value, ordinarily applies to  
10 cases of deliberate falsehood". (New England Electric Sys.  
11 v. Securities & Exchange Commission, 346 F. 2d 399, 408  
12 [reversed and remanded on other grounds, 384 U.S. 176, 86  
13 S. Ct. 1397]).

14 The testimony of Respondent's witnesses, which gave  
15 rise to the Board's findings of lack of credibility, has  
16 been extensively reviewed in the preceding section of this  
17 brief. It is quite clear that the subject matters of the  
18 testimony involved in these findings were peripheral and  
19 without direct significance or bearing upon the principal  
20 issue in the case. It is even more clear that not one of  
21 Respondent's witnesses was or could have been charged by  
22 the Board with willful or deliberate falsehoods upon a  
23 material issue.

24 The alleged bias and lack of candor, asserted to have  
25 characterized Mary Pina, is an excellent example of these  
26 findings by the Board. Pina had been examined extensively



1 on both direct and cross examinations with reference only  
2 to the subject of Fumero's work performance upon the  
3 spoiled garments. (See Tr. 173-188). The matter of her  
4 recognition of the Union organizer was a sudden interjection  
5 of an entirely new and different subject matter and was  
6 patently an obvious attempt by the General Counsel to  
7 confuse the witness for the purposes of impeachment. It is  
8 apparent that Pina had had an unpleasant experience with  
9 the organizer more than seven months before the date of the  
10 hearing, and insofar as the record shows, this was the only  
11 occasion upon which Pina had met this individual. Her  
12 hesitation in answering is thoroughly explainable, and her  
13 testimony reflects no more than ordinary human reactions in  
14 a situation of this kind.

15 In the case of Sherley Thompson, the Board contended  
16 that her testimony was attended by self-contradiction, be-  
17 cause she allegedly first testified that she was familiar  
18 with Fumero's machine stitch and recognized it, and then  
19 altered course and claimed that she did not know which of  
20 the operators had done the work. Respondent's review of  
21 the testimony in question in the preceding section of this  
22 brief flatly refutes the contention of the Board. At no  
23 time, on her direct or cross examination, did Thompson  
24 testify that she was familiar with the stitch of Fumero's  
25 machine and recognized it as Fumero's when she saw the  
26 defective work. Her testimony was that the stitch was



1 recognizable, but she did not know which girl's machine  
2 was involved.

3 Thompson was also charged with contradictions in her  
4 testimony at the time of the hearing and a pre-trial state-  
5 ment. In the pre-trial statement, Thompson stated, in  
6 effect, that she knew Fumero's work because each stitch is  
7 different, because the operator's clock number is on the  
8 bundle and because each girl ties the bundle differently.  
9 This compound sentence is not in contradiction to her testi-  
10 mony, for the reason that it covers, in a single sentence,  
11 a number of separate subjects which were explained in the  
12 testimony. She did not state that she recognized the work  
13 as Fumero's from the stitch alone. Considering the manner  
14 in which these pre-trial statements are obtained by Board  
15 agents, apparent contradictions of this type will neces-  
16 sarily arise and are of no significance. The same is true  
17 of the alleged contradiction between Thompson's testimony  
18 that she complained to Hazel Smith and her pre-trial state-  
19 ment in which she stated she complained to Yoshida. Her  
20 other testimony was that on such occasions the procedure was  
21 to complain to the supervisor in the department who would  
22 then call the plant manager. Again, it must be considered  
23 that the witness' reference in her pre-trial statement was  
24 her understanding that her complaint was really to Yoshida,  
25 even though such a complaint had to go first to Smith.

26 Another witness charged with self-contradiction,





1 coupled with exaggeration, was David Young. Fundamentally,  
2 the contention of the Board was that in the course of  
3 his examination he substantially expanded the number of  
4 times that Fumero requested a layoff, and that his testimony  
5 was contradicted by his pre-trial statement. A fair reading  
6 of the transcript reveals neither self-contradiction nor  
7 exaqqeration in Young's testimony. In his direct examina-  
8 tion, he testified that Fumero asked him on more than one  
9 occasion for a layoff. Counsel for Respondent examined him  
10 in detail as to only three of the conversations and then  
11 dropped the subject. For the first time, on cross-  
12 examination, he was specifically asked for the number of  
13 conversations, and he responded that he thought it was at  
14 least a half dozen times. The sentence in the pre-trial  
15 statement seized upon by the Board as evidence of lack of  
16 credibility was a portion of the witnesses' testimony con-  
17 cerning Fumero's request for a layoff at the time that the  
18 company was considering the swim suit business for the  
19 summer. Young described this episode in detail and then  
20 stated that Fumero asked him twice about being laid off. In  
21 the context of the statement, it is quite evident that the  
22 witness was not relating the total number of times overall  
23 that he could recall Fumero's request for a layoff, but was  
24 simply stating that on that particular occasion she asked  
25 him twice.

26 The Board also contended that Young gratuitously



1 injected the statement into his testimony that Fumero spoke  
2 English well, in the hope of discrediting him. This was  
3 based upon a finding of the Trial Examiner that Fumero did  
4 not speak English. No mention was made by the Board of the  
5 fact that Sanchez also testified that Fumero could speak  
6 English well except when she was excited. (Tr. 321).

7 Neither did the Board see fit to comment upon the fact that  
8 no extensive effort was made at the hearing to actually  
9 determine how much or how little English Fumero actually  
10 spoke and understood. The few questions asked by the Trial  
11 Examiner (Tr. 10) were hardly sufficient for the broad  
12 finding that Fumero could not understand English and to  
13 contend that Young was an incredible witness for the mere  
14 reason that he mentioned this fact.

15 Little need be said about the Board's rejection of the  
16 evidence of Geneveva Sanchez as "exaggerated". Sanchez had  
17 testified that Fumero asked her many times for a layoff, as  
18 much as five times in one day. Without the benefit of any  
19 substantially conflicting evidence, other than Fumero's  
20 general denial, the Board discredited Sanchez upon its un-  
21 supported contention that it was implausible to think that  
22 Fumero would have made such statements to Sanchez.

23 Yoshida was discredited as an evasive witness primarily  
24 by reason of the Board's rejection of his version of his  
25 conversation with Yanez. The statement relied upon by the  
26 Board that he did not know whether Fumero brought up the



1 subject of the Union or whether he brought it up is quite  
2 plainly as much an admission that he did raise the subject  
3 as a contention that Yanez raised it. Far from being an  
4 evasion, it constitutes only a simple statement that the  
5 witness did not remember at the time of the hearing. The  
6 Board also contends that Yoshida was evasive and failed to  
7 explain his unwillingness to speak to Yanez at her machine,  
8 but the flat answer to that contention is that he was never  
9 asked, either directly or indirectly.

10 Finally, although the Board gives no more weight to the  
11 testimony of Hazel Smith than it did to the other five wit-  
12 nesses appearing on behalf of Respondent, Smith was not  
13 directly charged with the lack of credibility other than a  
14 comment that she had an interest in the proceeding. These  
15 labored findings of lack of credibility attributed by the  
16 Board to Respondent's witnesses should not be sustained by  
17 this Court. "While recognizing that the question of  
18 credibility is for the trial examiner, an Appeals Court is  
19 not precluded from independently determining what weight  
20 certain testimony which he finds credible should be given  
21 when evaluating the evidence on the record as a whole".

22 (Portable Electric Tools, Inc. v. N.L.R.B. [CA-7 1952], 309  
23 F. 2d 423, 426). The Portable Electric Tools case involved  
24 the same considerations and issues now before this Court, for  
25 the reason that the Trial Examiner and the Board in that  
26 case based their findings of violations of the Act upon



1 reliance exclusively upon the testimony of the charging  
2 party and by denying credibility to the testimony of the  
3 "many witnesses" called by the company.

4 Similarly, in N.L.R.B. v. Denton (CA-5 1954), 217 F. 2d  
5 567, the Fifth Circuit refused to enforce an order of the  
6 Board requiring re-instatement of an employee, whom the  
7 Board found to have been discriminatorily discharged, upon  
8 the grounds that the Board had "\* \* \* inadvertently attached  
9 undue emphasis to the testimony as to his conceded pro-union  
10 status, while minimizing other substantial evidence of his  
11 admitted derelictions \* \* \*" given by the witnesses for the  
12 employer. (217 F. 2d 567, 570-571). See also: Farmers  
13 Co-Operative Co. v. N.L.R.B. (CA-8 1953), 208 F. 2d 296, and  
14 Victor Products Corp. v. N.L.R.B. (CA-DC 1953), 208 F. 2d  
15 834.

16 The Board applied inconsistent standards in its evalu-  
17 ation of the testimony of Dulce Fumero, as opposed to its  
18 evaluation of the testimony of Respondent's witnesses.  
19 This "dual" standard is readily apparent by reference both  
20 to the Board's decision and to Fumero's testimony at the  
21 hearing. In the words of the Trial Examiner, affirmed by  
22 the Board, "\* \* \* Fumero's interest (as an alleged discrimi-  
23 natee) is obvious, \* \* \* and in addition, she appeared to  
24 me, even through the barrier of language, to be given to  
25 emotional attitudes somewhat more readily than the average  
26 person, leaving me with the impression at times that her





1 feelings colored her concepts of what had been said or done.  
2 Moreover, I have at least some doubt that her grasp of  
3 English was always sufficient to absorb or repeat accu-  
4 rately what she claims to have heard". (R. 31). Again, with  
5 regard to Fumero's claims of repeated statements by Manage-  
6 ment on the subject of contract work (R. 32), the Examiner  
7 was left with "\* \* \* a substantial question whether some or  
8 all of her portrayal reflects assumptions she makes as to  
9 arguments the Company would advance in a debate over unioni-  
10 zation".

11         Nevertheless, despite its own findings of flaws and  
12 fallibility in Fumero's competence to accurately portray  
13 what she had seen and heard and despite the fact that, with  
14 even less provocation, the Trial Examiner and the Board  
15 discredited all of the testimony of Respondent's witnesses,  
16 the Board gave full credence to Fumero's version of her last  
17 days of employment.

18         Adopting the Board's views upon the credibility of  
19 Respondent's witnesses, Fumero's own contradictions and  
20 exaggérations should have cast an equal cloud upon her  
21 credibility. Fumero, in her testimony, it will be recalled,  
22 denied not only telling Young that she wanted a layoff  
23 while her children were out of school but, in what amounted  
24 to a blanket denial, denied that she had mentioned a layoff  
25 to any supervisor, except upon her last day at work (Tr.  
26 362). The Board, however, entirely overlooked her



1 contradictory testimony on direct examination that in  
2 response to Young's alleged threat of a layoff if the Union  
3 succeeded, she asked: "\* \* \* why wait until there is a  
4 slack off, why not just lay me off now". (Tr. 24). Fumero  
5 was also guilty of the same exaqqerations in her testimony  
6 that the Board held against Respondent's witnesses, Young  
7 and Sanchez. For example, she was asked if Young had ever  
8 mentioned Olga and Cole, two other garment manufacturers.  
9 She first replied, "Three or four times". Then Fumero  
10 contended that this subject was mentioned to her "Once a  
11 week or every two or three days. \* \* \* From the time that I  
12 had the meeting at my house until the day before the  
13 elections". (Tr. 28-29). Similarly, in her rebuttal  
14 testimony, Fumero denied calling Hazel Smith a profane name  
15 by testifying that "Never have I spoken with her anything  
16 other than work, or anything have to do with work". (Tr.  
17 363). On cross-examination, Fumero, upon being asked if  
18 Hazel Smith had given her a bed, indulged first in an angry  
19 and indignant outburst, "We are not here to bring out all  
20 of the little things that have been going on. If I were  
21 to mention the things I have given her, we'd be here the  
22 rest of the night and even more. If we could concentrate on  
23 what the problem is here." (Tr. 365). Following an admoni-  
24 tion by the Trial Examiner, she then admitted that she had  
25 bought a headboard from Smith (Tr. 365), which would indeed  
26 imply that she had had conversations with Smith concerning



1 matters other than her work.

2 From this entire record, it is impossible to sustain  
3 the Board's conclusion that Fumero was the more credible  
4 witness. In fact, a fair reading of her testimony must lead  
5 to the conclusion that she was the least credible witness  
6 in the whole proceeding.

7 C. The Board's Findings Against Respondent Were Based Upon  
8 Inferences Which Were Unsupported By The Evidence And  
9 Which Were Speculative And Conjectural.

10 In order to support its ultimate Findings of Fact that  
11 Fumero's work was not deficient and that Respondent engaged  
12 in a deliberate plan to find unwarranted fault with Fumero's  
13 work with the aim of humiliating her and inducing her to  
14 quit her employment, the Board drew inferences and conclu-  
15 sions which were either wholly unsupported by any evidence  
16 or which amounted to sheer speculation and conjecture. In  
17 some instances, the inferences drawn were not reasonable  
18 choices of the possible inferences raised by the facts.

19 The Board concluded that it defied "rational belief"  
20 that Fumero, whom the Board inferred was dependent upon her  
21 earnings for her support and the support of her children,  
22 would deliberately seek discharge to secure reduced, tem-  
23 porary income from unemployment compensation. (R. 41).

24 There is not a line or a word of evidence in the entire  
25 record from which this inference can be drawn. The Board  
26 had utterly no knowledge of whether Fumero was wealthy or



1 poor, whether she was moderately well off or totally depen-  
2 dent upon her earnings. Neither did the Board have evidence  
3 whether Fumero was married and well-supported by her husband  
4 or widowed and the sole support of the family. As a matter  
5 of fact, the uncontradicted evidence in the record would  
6 sustain only the opposite inference: that Fumero was indeed  
7 not dependent upon her earnings. Not only is the record  
8 replete with evidence that Fumero had on more than one  
9 occasion, requested a layoff while her children were out of  
10 school, but the uncontradicted evidence also is that she  
11 was on a leave of absence from July 18th through October  
12 17th, 1964, and, again, from October 2nd through October  
13 30th, 1965. (Tr. 289; 305). Fumero herself testified that,  
14 when Young allegedly told her that she would be laid off  
15 when the season "slacked off", she suggested that he not  
16 wait but "\* \* \* just lay me off now". (Tr. 24). Moreover,  
17 there is no evidence to support the Board's finding that it  
18 was implausible to believe that Fumero would resort to the  
19 self-defeating dodge of deliberate misconduct which would  
20 deprive her of unemployment benefits. It cannot be said  
21 from the evidence of Respondent's witnesses that Fumero was  
22 seeking a discharge, for, to the contrary, it is clear that  
23 she wanted a "layoff". Her insistence to Young that she  
24 was doing the best she could and her own admission that she  
25 asked Yoshida "\* \* \* to take me out of the plant with a  
26 document -- to give me a layoff with a document so that I





1 could work elsewhere." (Tr. 38), is evidence that Fumero was  
2 not seeking discharge, but was seeking a layoff which would  
3 have guaranteed unemployment benefits. It also should be  
4 noted that although "willful misconduct" under California  
5 Unemployment Insurance Code Section 1256 constitutes grounds  
6 for denial of unemployment benefits, the definition of  
7 willful misconduct, adopted by the Courts of the State of  
8 California, requires such a high degree of proof of deliber-  
9 ate and willful acts purposely engaged in against the best  
10 interests of the employer, that it is extremely difficult to  
11 establish this ground of disqualification upon the basis of  
12 an employee's work performance. (Maywood Glass Co. v.  
13 Stewart, 170 C. A. 2d 719).

14 Another conclusion drawn by the Board was that it would  
15 be a "manifest absurdity" to claim that Fumero's deficient  
16 work was a result of sudden incompetence. (R. 41). In other  
17 words, upon the uncontradicted evidence that Fumero had been  
18 a good operator prior to this period of time, the Board  
19 simply decided that it was not possible for her work perform-  
20 ance to suffer the sudden and drastic decline shown by the  
21 evidence. There is no rational basis for this assumption by  
22 the Board. The fact is that capable employees of many years'  
23 standing do, for various reasons, quite suddenly commence  
24 performing inferior work. This unfortunate human propensity  
25 on the part of employees has been the subject of a great  
26 many cases in arbitration under union contracts. The



1 Board itself has been reminded of this fact by the Courts  
2 of Appeal. The Court, in N.L.R.B. v. Plastics Products  
3 (CA-6), supra, noted that the discriminatee had been  
4 employed for five years and that "at one time he had been  
5 a satisfactory employee, but had become increasingly  
6 unreliable and insubordinate \* \* \*". Again, from the  
7 opinion in the Farmers Co-Operative case, supra, the employee  
8 there involved "\* \* \* seemed to get along very well for a  
9 time and then things became unsatisfactory". (208 F. 2d 296,  
10 300). The inference drawn by the Board that Fumero could  
11 not have become suddenly incompetent was not only unsupported  
12 by the evidence, it was quite contrary to ordinary human  
13 experience and cannot be sustained.

14 As we have said before in this brief, the primary issue  
15 before the Board was whether Fumero did damage Respondent's  
16 garments. Justice would appear to compel something more  
17 than determination of this issue by an inference that it is  
18 manifestly absurd to believe that an employee's work suddenly  
19 became deficient or that the employee would not in any event  
20 have sought discharge or layoff because she was dependent  
21 upon her earnings. This, however, is precisely the approach  
22 taken by the Board in this case. It refuted, on the grounds  
23 of manifest absurdity, the entire premise that Fumero's work  
24 became deficient and rejected, on the grounds of implausi-  
25 bility, that she deliberately courted dismissal. Thus, the  
26 Board claimed that there remained only the final inference



1 that her work was not deficient and that Respondent was  
2 merely engaged in faultfinding. (R. 43).

3 It is axiomatic that if several possible inferences  
4 may be reasonably drawn from the evidence, the trier of fact  
5 must consider and give equal weight to all of the possible  
6 inferences. There is a further, far more plausible infer-  
7 ence that should have been drawn from Fumero's own testimony.  
8 Fumero testified that she was "\* \* \* very sick from nerves"  
9 (Tr. 53; 362); and that this ailment commenced at the time  
10 of the first Union meeting at her home. (Tr. 53). Throughout  
11 her testimony, Fumero made repeated reference to her extreme  
12 case of nerves, her poor circulation and to the fact that  
13 she saw her doctor weekly. It is obvious that she was badly  
14 disturbed by her health. This admitted evidence of progres-  
15 sive illness, when considered with Respondent's evidence of  
16 the decline in the quality of her work, leads directly to  
17 the only rational conclusion upon the evidence that Fumero's  
18 poor work performance was attributable directly to her  
19 nervous and mental condition, which required constant treat-  
20 ment by a doctor. Yet, this possible conclusion, and,  
21 certainly, reasonable inference from Fumero's own evidence  
22 was never considered or discussed by the Board.

23 The Board also argues that an inference should be drawn  
24 against Respondent because, assuming Fumero's work was de-  
25 ficient, it was difficult to understand why she was not  
26 discharged. Considering the hazards of N.L.R.B. action on



1 behalf of discharged union adherents and considering the  
2 complaint issued in the present case, it is most easy to  
3 understand why Respondent did not discharge Fumero, and  
4 difficult to understand the Board's reasoning in assigning  
5 this fact as an inference against Respondent.

6 A finding cannot rest merely upon guess, suspicion or  
7 speculation predicated upon inferences arising from widely  
8 separated and inconsequential incidents. Particularly is  
9 this so when inferences are utilized to overcome direct and  
10 positive testimony. (N.L.R.B. v. Mallory & Co. (CA-7 1956),  
11 237 F. 2d 443). An inference cannot stand in the face of  
12 established or admitted facts or in the face of another  
13 inference equally reasonable. (Commercial Standard Insur-  
14 ance Co. v. Gordon's Transports, Inc. [CA-6 1946], 154 F.  
15 2d 390). "While a satisfactory conclusion may be reached  
16 through an inference from established facts, there must  
17 still be facts proved from which the inference can be drawn.  
18 No inference of fact can be drawn from a premise which is  
19 wholly uncertain". (Kenney v. Washington Properties, 128  
20 F. 2d 612, 615).

21 Although the Court may not disturb the Board's choice  
22 between equally conflicting inferences, the Court is em-  
23 powered to displace the Board's initial choice where there  
24 is no substantial evidence on the record considered as a  
25 whole to support the inference drawn by the Board as  
26 "reasonable". (N.L.R.B. v. Coates & Clark, (CA-6 1956), 231

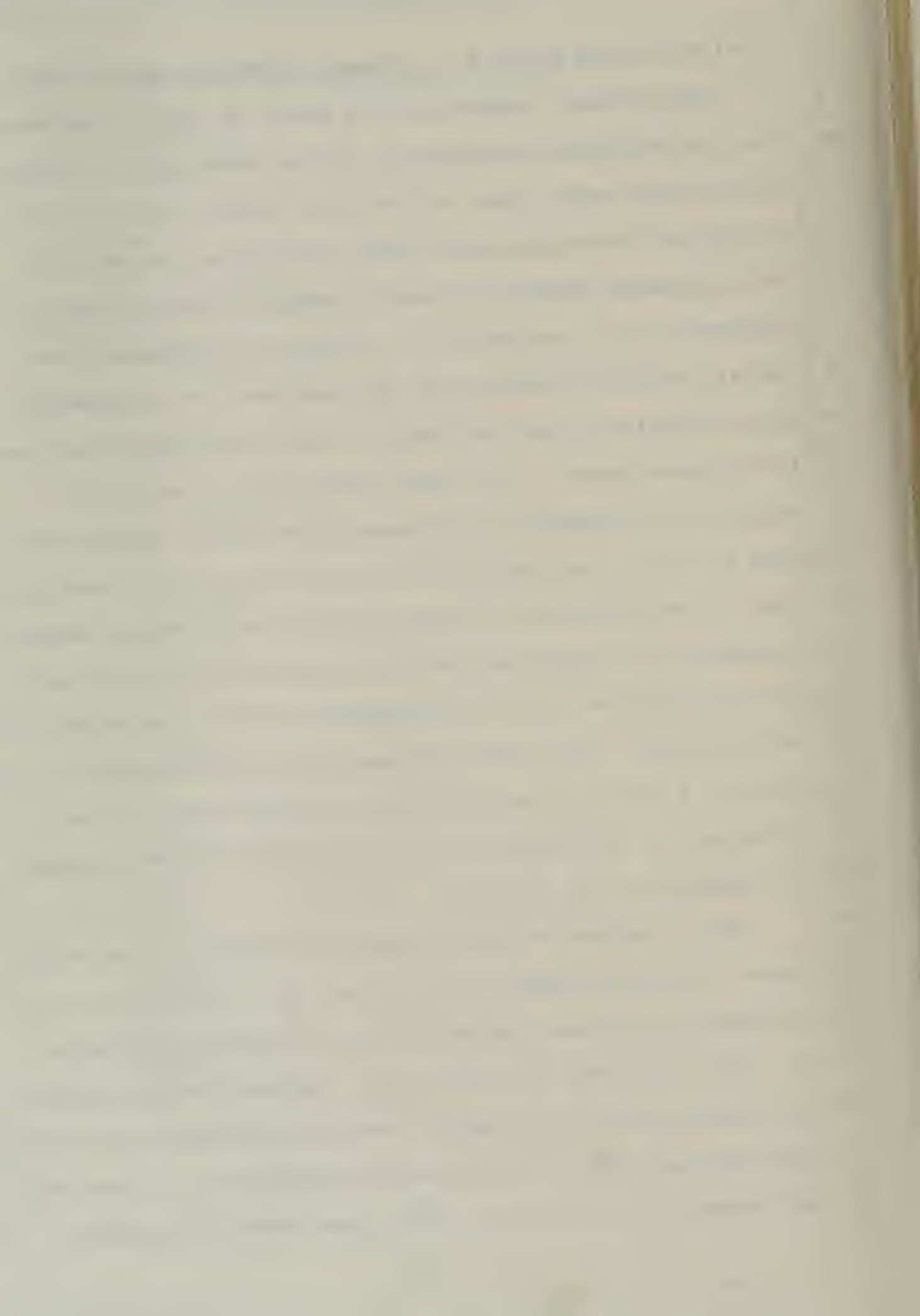




1 F. 2d 567); and N.L.R.B. v. Sunset Minerals, Inc., supra.

2 The approach adopted by the Board in drawing inferences  
3 from the evidence was contrary to the principles of legal  
4 reason which must guide any trier of fact. Not only did the  
5 Board draw inferences which were unsupported by evidence  
6 and inferences which were wholly speculative, the Board also  
7 reached certain conclusions by adopting inferences from  
8 certain selected portions of the testimony of witnesses,  
9 while ignoring other testimony on the same subject and even  
10 in the same answer. As argued hereinabove, the Board  
11 adopted the unsupported inference that Fumero needed employ-  
12 ment and would not jeopardize it by poor work and speculated  
13 that it was absurd to believe that she would become suddenly  
14 incompetent. Therefore, the Board reasoned that her work  
15 was not deficient and that Respondent engaged in unjustifiable  
16 faultfinding. For further support of this unwarranted con-  
17 clusion, the Board then drew the inference that she was  
18 subjected to "needlessly close inspection" for the purpose  
19 of humiliating her (R. 43).

20 Pina, Yoshida and Smith each testified that the super-  
21 visors routinely checked the work of all of the girls on a  
22 daily basis and that the inspection of Fumero was similar  
23 (Tr. 179; 185; 282; 284; 354-355). Sanchez checked some of  
24 the swim suits but was mostly involved in checking the robes.  
25 She testified that she had her own department in which she  
26 was checking her girls but would leave everything and go



1 down to check Fumero's work (Tr. 310). She did not allow  
2 her to pile up too much work, and when Fumero finished a  
3 bundle, Sanchez would check each garment. Sanchez checked  
4 for about a week, because she had her own work (Tr. 312-313).  
5 After five to eight days on the robes, Sanchez stopped  
6 inspecting because Fumero was again performing her work  
7 satisfactorily (Tr. 329). The Board, however, found that  
8 the faultfinding lasted until the end of Fumero's employment  
9 (R. 38) and was a special procedure aimed at humiliating  
10 Fumero. It reached this inference by referring to the  
11 testimony of Sanchez that she would check every garment in  
12 the bundle, but ignoring the other evidence of Sanchez that  
13 she was also engaged in checking her own department and,  
14 thus, was not standing over Fumero constantly. The Board  
15 then claims that the faultfinding lasted until the end of  
16 Fumero's employment, contrary to the evidence of Respondent's  
17 witnesses, by contending that Yoshida's testimony that  
18 Fumero's sewing on the robes was defective on sixty to  
19 seventy percent of them, necessarily raised the inference  
20 that this procedure was followed to the end of her employ-  
21 ment. Quite plainly, when a witness is only asked what  
22 percentage of garments were damaged, his answer raises no  
23 inference as to the period of time in which the damage was  
24 done. If the Board had credited the complete testimony of  
25 Sanchez on this point, rather than selected portions thereof,  
26 and had properly credited Yoshida's answer for the purpose



1 for which it was given, the Board simply could not have  
2 reached the conclusion that Fumero was subjected to a  
3 needlessly close inspection procedure.

4 This Court is not bound by the inferences drawn by the  
5 Board or the conclusions of ultimate facts based upon such  
6 inferences. Insofar as "the so-called 'ultimate fact' is  
7 simply the result reached by processes of legal reasoning  
8 from, \* \* \* or the interpretation of the legal significance  
9 of, the evidentiary facts, it is 'subject to review free of  
10 the restraining impact of the so-called "clearly erroneous"  
11 rule.'" (Galena Oaks Corp. v. Scofield, 218 F. 2d 217, 219).  
12 The Court of Appeals for the Seventh Circuit in the Portable  
13 Electric Tools case, supra, succinctly summarized the extent  
14 of Appellate review of such Board orders:

15 "The fact that a solid basis for the discharge  
16 of Mrs. Ballard for cause exists would not, standing  
17 alone, prevent the Board from finding that her dis-  
18 charge was motivated by her union activity--provided  
19 there is substantial evidence in the record con-  
20 sidered as a whole to support such a finding. Osce-  
21 ola County Co-Op. Creamery Ass'n. v. N.L.R.B., 251  
22 F. 2d 62, 41 LRRM 2289 (8th Cir. 1958). If this  
23 Court, however, is not to be 'merely the judicial  
24 echo of the Board's conclusion' then its determina-  
25 tion must 'be set aside when the record . . .  
26 clearly precludes the Board's decision from being



1 justified by a fair estimate of the worth of the  
2 testimony of witnesses or its informed judgment on  
3 matters within its special competence or both . . .  
4 The substantiality of evidence must take into  
5 account whatever in the record fairly detracts  
6 from its weight.' Universal Camera Corp. v.  
7 N.L.R.B., 340 U.S. 474, 27 LRRM 2373. While re-  
8 cognizing that the question of credibility is for  
9 the trial examiner, an Appeals Court is not pre-  
10 cluded from independently determining what weight  
11 certain testimony which he finds credible should  
12 be given when evaluating the evidence on the  
13 record as a whole.

14 "The Board argues the discriminatory nature  
15 of Mrs. Ballard's discharge as though the burden  
16 was upon the petitioner to exonerate itself of the  
17 charges made against it. The burden, however, is  
18 on the Board to show affirmatively by substantial  
19 evidence that the discharge was discriminatory and  
20 motivated by Mrs. Ballard's alleged union activities."  
21 (309 F. 2d 423, 426).

22 When measured by the standards or requirements under  
23 the substantial evidence rule which have been imposed by the  
24 decisions of the various Courts of Appeal cited herein,  
25 the Board's findings that Respondent discriminated against  
26 Dulce Fumero are clearly erroneous.

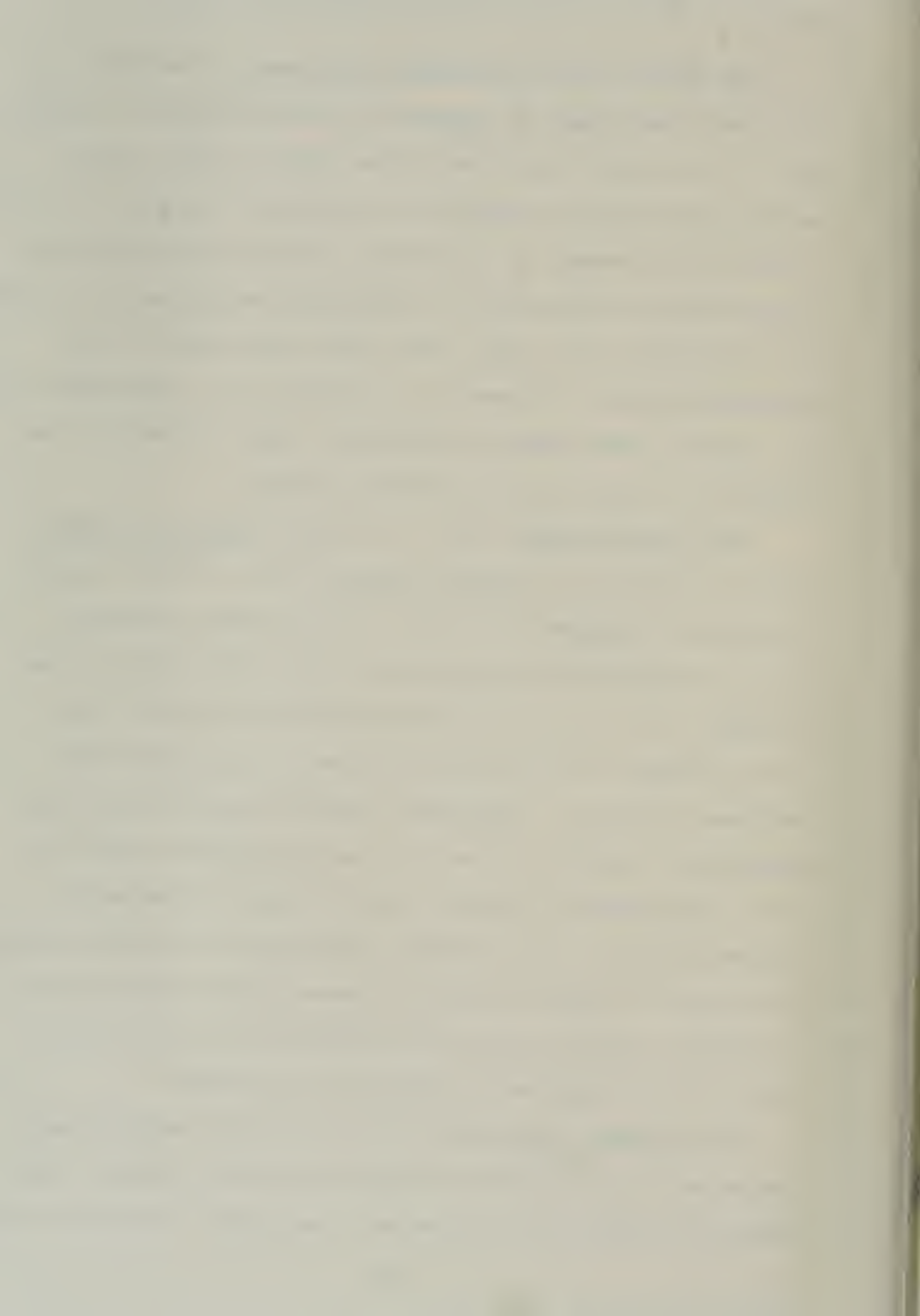




1           The Board in the concluding paragraph of its brief (p.  
2 15) cites five cases in support of its Petition for Enforce-  
3 ment. It is true that these cases involve Board orders  
4 holding the employers therein in violation of Section 8(a)(3)  
5 of the Act by reason of the Board's findings that they had  
6 constructively discharged or otherwise discriminated against  
7 union adherents and, thus, bear some resemblance to the  
8 proceeding herein. However, as authority for enforcement of  
9 the Board's order against Respondent, these cases must be  
10 deemed to be superficial authority at best.

11           The Saxe-Glassman (201 F. 2d 238), Tennessee Packers  
12 (339 F. 2d 203), and Vacuum Platers (374 F. 2d 866) cases  
13 stand for the proposition that a constructive discharge,  
14 which is caused by discriminatory acts on the part of the  
15 employer, is a violation of Section 8(a)(3) of the Act,  
16 just as though the employer had directly terminated the  
17 employee involved. Respondent does not quarrel with this  
18 proposition standing alone, but, as is apparent from its  
19 brief, Respondent's dispute with the Board concerns the  
20 substantiality of the evidence underlying the Board's order.  
21 The Courts of Appeal in each of these three cases enforced  
22 the Board's orders upon their conclusion that the orders  
23 were in fact supported by substantial evidence.

24           The Bausch & Lomb case (217 F. 2d 575) involved per-  
25 vasive anti-union tactics on the part of the company culmi-  
26 nating in several discriminatory discharges, demotions and



1 failures to re-employ after layoff. The evidence was con-  
2 flicting, and, in the case of the discriminatorily laid-off  
3 employee, a finding had to be made whether the employee did  
4 or did not have the skill to perform the remaining available  
5 work. The Court of Appeals for the Second Circuit enforced  
6 the Board's order, under the substantial evidence rule, and  
7 accorded due weight to the special competence of the Trial  
8 Examiner and the Board to draw the inference of discrimina-  
9 tion; however, it is significant that in the text of its  
10 opinion the Court observed:

11 "It is to be noted that the trial examiner exercised  
12 care and discrimination in making his findings and  
13 recommendations and that he refused to find unfair  
14 labor practices in the separation of 41 additional  
15 employees named in the General Counsel's complaint".

16 Had the Trial Examiner and the Board exhibited the  
17 degree of care and discrimination in this case that was  
18 sustained by the Courts in the cited cases, Respondent  
19 cannot but conclude that the 8(a)(3) findings, which are  
20 now in dispute, would never have been lodged against Respon-  
21 dent in the first instance. The Monroe Auto Equipment case  
22 (67 LRRM 2973) was also based upon discriminatory construc-  
23 tive discharges. The Court of Appeals for the Fifth Circuit  
24 found that the evidence was "not as strong" as in other cases  
25 but the Court was unable to say that the findings therein  
26 were not supported by substantial evidence. The Court also



1 noted the rule, as has been cited to the Court herein, that  
2 the Courts of Appeal may decline to follow the findings on  
3 credibility of the Board and are not barred from setting  
4 aside a decision if the Court cannot conscientiously find  
5 that the evidence in support thereof is substantial.  
6 Finally, the Fifth Circuit held that it was not at liberty  
7 to displace the Board's choice between two fairly conflict-  
8 ing views of the evidence.

9 These cases in no way detract from Respondent's posi-  
10 tion herein. The question of compliance by the Board with  
11 the requirements of the substantial evidence rule must  
12 obviously be determined on a case-to-case basis, and it is  
13 Respondent's position that in this instance the Board's  
14 order should not be enforced.



CONCLUSION

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3  
4 The Board's findings that Respondent harassed and  
5 humiliated Fumero into leaving her employment and that it  
6 subsequently refused to re-employ her because of an unlawful  
7 motive to get rid of her in punishment for her union acti-  
8 vities are not supported by the record. The clear weight of  
9 the evidence establishes the fact that Respondent patiently  
10 tolerated a substantial amount of costly damage to its pro-  
11 duct at her hands. And, upon a fair review of all of the  
12 evidence, Fumero cannot be found to have genuinely sought  
13 re-employment. The fact is, the question of what did happen  
14 upon her return to Respondent in June, 1966, is immaterial,  
15 for even if the evidence be deemed to support Fumero's  
16 version of the events, there can be no doubt that Respondent  
17 had ample justification for refusing to rehire her.

18 Respondent's witnesses were unjustly and improperly  
19 found to lack credibility; the inferences drawn by the Board  
20 were unsupported by evidence and were speculative and con-  
21 jectural; and the Board improperly credited all of the  
22 uncorroborated testimony of Fumero in order to reach its  
23 conclusion that Respondent had violated Sections 8(a)(1) and  
24 (3) of the Act. Respondent respectfully submits that the  
25  
26





1 Board's petition for enforcement herein should be denied.

2

3 June 6, 1968

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CERTIFICATE

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WILLIAM B. IRVIN

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